Supreme Court, U. S.
FILED
SEP 13 1976
MICHAEL RODAK, JR., CLERK

No. 75-1811

In the Supreme Court of the United States

OCTOBER TERM, 1976

IN RE NICHOLAS R. ALLIS, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

SIDNEY M. GLAZER,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 531 F. 2d 1391.

JURISDICTION

The judgment of the court of appeals affirming petitioner's conviction for criminal contempt was entered on March 10, 1976. A petition for rehearing was denied on May 13, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on June 14, 1976, and is therefore out of time under Rule 22(2) of this Court's Rules. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the district court's finding that an attorney was in contempt of court for tardiness in appearing at a hearing specially scheduled at the attorney's request.

2. Whether the contempt proceedings complied with the requirements of Fed. R. Crim. P. 42(b).

RULE INVOLVED

Fed. R. Crim. P. 42 provides:

> (a) **Summary Disposition.** A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> **(b) Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioner, defense counsel in a criminal case, was adjudged guilty of contempt of court and was fined $100 by Judge Irving Hill of the United States District Court for the Central District of California for tardiness in appearing in that court at a scheduled proceeding. The court of appeals affirmed, one judge dissenting (Pet. App. A).

On March 6, 1974, petitioner, a Deputy Federal Public Defender, failed to appear in court at the time set for the sentencing of a defendant whom he represented in a criminal case. When petitioner appeared in court approximately twenty minutes late, he acknowledged that the sentencing proceeding had been set at his special request, that he "had not been on time more than once heretofore in this court, and on at least one, if not all of those prior occasions, [was] admonished in the most strict terms that scrupulous promptness was a lawyer's obligation" (Pet. App. A-13 to A-14). The trial judge notified petitioner that he was "in imminent likelihood of being found in contempt," that he would be allowed reasonable time to consult with another attorney, that the court would declare a recess for the purpose, and that thereafter petitioner and his counsel would be heard (Pet. App. A-14). After a ten minute recess, petitioner appeared with the Federal Public Defender, who had entered the courtroom prior to the recess (Pet. App. A-14), and gave the following explanation for his late appearance at the scheduled proceeding (Pet. App. A-15 to A-16):

> Well, I don't really have an excuse, your Honor. It was my fault. I did forget it. I had it marked on my calendar. I went in with the file this morning to my secretary. I asked her to remind me of it.

> I spent the whole lunch hour up in my office preparing for the case in Judge Ferguson's court. I didn't think of this case during the noon hour like I thought of it when I came into the office this morning.
>
> And I left to go down to Judge Ferguson's court about 1:17, and I have been there sitting at the defense counsel table preparing that case since then.

The court thereupon asked the Federal Public Defender if he desired to be heard in any respect. The latter, after acknowledging that petitioner had previously been tardy in appearing before the same judge, stated that petitioner's tardiness was not intentional and that petitioner had been making conscientious efforts to be on time for court appearances (Pet. App. A-16 to A-18). The court, noting that petitioner had been given stern warnings, in the strongest terms possible, on more than one previous occasion, adjudged him in contempt of court and imposed a $100 fine (Pet. App. A-18 to A-20). Thereafter, the court filed a written order finding petitioner in contempt (R. 1-2).

On March 15, 1974, petitioner moved to vacate the contempt order (R. 3). In a supporting affidavit petitioner again recited that on the day in question he had asked his secretary to remind him of the appearance; he recounted in more detail the case that he had before Judge Ferguson, and he stated that his tardiness was not willful but was "the result of lapse of memory and preoccupation with another case" (R. 8). He said that during the week of July 17, 1973, Judge Hill had warned him about failing to appear or failing to appear on time and had offered him the choice of contempt or a $25 contribution to the library fund; and that on July 20, 1973, he had inadvertently missed an appearance in

another case but that another lawyer had appeared in his stead (R. 5-6).[1] He stated that on the occasion of his only tardiness out of sixteen appearances before Judge Hill between July 17, 1973, and March 6, 1974, he had advised the court clerk in advance that he would be late because of an appearance in another courtroom that had precedence (R. 6-7). This motion was denied by the district court.

ARGUMENT

1. The court of appeals correctly held that the evidence was sufficient to justify adjudging petitioner, an attorney, in contempt for tardiness. As it concluded: "A contempt is wilful disregard or disobedience of public authority and the requisite wrongful intent may be inferred from an attorney's reckless disregard of his obligations to the court" (Pet. App. A-5). An attorney, as an officer of the court, has an obligation to be punctual so as to avoid delays in the administration of justice in the courts and inconvenience to court personnel, litigants and witnesses, and other attorneys. Here, petitioner admitted in open court that he did not "really have an excuse" for failing to be on time at a proceeding specially set at a time requested by petitioner (Pet. App. A-15). He conceded his fault, explaining that he simply forgot about the appearance. He also acknowledged both in open court and in his written motion to vacate that this was not an isolated instance: he had been previously admonished by the same district judge some eight months earlier about a late appearance. On this record, the evidence is sufficient to support the finding of contempt. See *In re Niblack*, 476 F. 2d 930 (C.A. D.C.).

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[1] The court below was supplied a copy of the reporter's transcript of the proceedings in court which reflected these occurrences.

2. The procedure employed by the district court in its adjudication of contempt satisfied the notice and hearing requirements of Rule 42(b) of the Federal Rules of Criminal Procedure.[2] The district court notified petitioner orally, as the rule permits, that petitioner stood "in imminent likelihood" of contempt for his tardiness and that he had been admonished about tardiness on previous occasions. Unjustified tardiness by an attorney evidences a reckless or willful disregard of public authority. *United States* v. *Delahanty*, 488 F. 2d 396, 398 (C.A. 6); *Sykes* v. *United States*, 444 F. 2d 928 (C.A. D.C.). Therefore the notification constituted an adequate warning to petitioner that he faced punishment for a reckless disregard of his responsibility as an attorney if he failed to justify his tardiness. Nor was it necessary for the court to specify the prior occasions of tardiness in the notice, any more that it is necessary to allege the prior acts of misconduct used to prove the requisite intent to commit an offense charged in an indictment.

The district court also complied with the rule's requirement that the notice allow "a reasonable time for the preparation of the defense." As the court of appeals pointed out (Pet. App. A-9):

> The facts were clear and undisputed. At no time was an indication given of the availability of other witnesses or evidence to support a defense of justification or excuse.

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[2]Since the procedure satisfied Rule 42(b), it is not necessary to consider whether tardiness may be punished summarily under Rule 42(a). See *In re Gates*, 478 F. 2d 998 (C.A. D.C.); *In re Niblack*, *supra*. Cf. *United States* v. *Wilson*, 421 U.S. 309.

Significantly, petitioner made no request for an extension of time to obtain additional evidence, to review the law, or to obtain additional counsel. Indeed, while his motion to vacate gave an explanation regarding two specific occasions when petitioner appeared late or failed to appear before Judge Hill, it contained nothing inconsistent with petitioner's admission in open court that he was at fault and that on this occasion he simply forgot. His motion did no more than document his previously declared preoccupation with another case and his secretary's failure to notify him. Thus, in the circumstances of this case, petitioner was afforded a reasonable time to prepare his defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

SIDNEY M. GLAZER,
Attorney.

SEPTEMBER 1976.

DOJ-1976-09